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8                   UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
9                   AT TACOMA

10                  LEROY WILLIAMS,

11                  Plaintiff,

12                  v.

13                  DR. GALLAGHER,

14                  Defendant.

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16                  CASE NO. C09-5805BHS

17                  ORDER ADOPTING AMENDED  
18                  REPORT AND  
19                  RECOMMENDATION

20                  This matter comes before the Court on the Amended Report and Recommendation  
21                  ("R&R") of the Honorable J. Richard Creatura, United States Magistrate Judge (Dkt. 29).  
22                  The Court has considered the R&R, Plaintiff Leroy Williams's ("Williams") objections, and  
23                  the remaining record and hereby adopts the R&R (Dkt. 29) and grants Defendant Dr.  
24                  Gallagher's ("Gallagher") motion for summary judgment for the reasons stated herein.

25                  On January 28, 2010, Williams filed a complaint against Gallagher based on alleged  
26                  civil rights violations under 42 U.S.C. § 1983. Dkt. 5. On August 31, 2010, Gallagher filed  
27                  a motion for summary judgment. Dkt. 19. On November 5, 2010, the magistrate judge  
28                  issued an R&R stating that the action should be dismissed without prejudice since mail sent  
                        to Williams by the clerk's office on April 19, 2010, and April 30, 2010, was returned as

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30                  ORDER – 1

1 undeliverable. Dkt. 21 at 2 (citing Local Rule CR 41(b)(2)). On November 19, 2010,  
2 Gallagher filed objections to the R&R with an attached email from Shari R. Hall (“Hall”),  
3 the legal liaison for the facility at which Williams is incarcerated, stating that Williams had  
4 in fact been served with the motion for summary judgment and refused to accept the  
5 documents. *See* Dkt. 24; *see also* Dkt. 26 (declaration of Hall attesting to the statements  
6 made in her email attached to Gallagher’s objections). Gallagher objected to the R&R to the  
7 extent that it recommended dismissal without prejudice. Dkt. 23 at 2.

8       On January 5, 2011, the Court issued an order in which it concluded that Williams  
9 had been given the opportunity to receive and respond to Gallagher’s motion for summary  
10 judgment and re-referred the action to the magistrate judge for consideration of Gallagher’s  
11 motion. Dkt. 27. On January 13, 2011, the magistrate judge issued an amended R&R  
12 concluding that Williams’s refusal to accept the motion for summary judgment and lack of  
13 response to such motion should be considered an admission that the motion has merit under  
14 Local Rule 7(b)(2) and that the action should be dismissed with prejudice. Dkt. 28. On  
15 January 26, 2011, Williams filed a document stating that he had previously filed an affidavit  
16 asking that this case be voluntarily dismissed without prejudice. Dkt. 29. However,  
17 Williams is not entitled to a voluntary dismissal without prejudice when Gallagher has filed  
18 an answer and a motion for summary judgment. Fed. R. Civ. P. 41(a)(1). Therefore, the  
19 Court concludes that Gallagher’s motion for summary judgment should be granted as  
20 Williams has failed to respond. *See* Local Rule CR 7(b)(2) (stating that “[i]f a party fails to  
21 file papers in opposition to a motion, such failure may be considered by the court as an  
22 admission that the motion has merit”).

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28 ORDER – 2

1 Therefore, the Court hereby **ORDERS** as follows:

2 (1) The R&R (Dkt. 28) is **ADOPTED**;

3 (2) Gallagher's motion for summary judgment (Dkt. 19) is **GRANTED** and this  
4 action is **DISMISSED with prejudice**.

5 DATED this 10th day of March, 2011.

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8 BENJAMIN H. SETTLE  
9 United States District Judge  
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